UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, AFL-CIO	)	
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 8, AFL-CIO	)	
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 40, AFL-CIO	)	**Case Nos. 19-CD-080738 19-CD-082461 19-CD-087505**
and	)	
ICTSI OREGON, INC.	)	
and	)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 48	)	

PACIFIC MARITIME ASSOCIATION'S MOTION TO INTERVENE

Pursuant to 29 U.S.C. § 160(b) of the National Labor Relations Act ("NLRA" or "Act"), the Pacific Maritime Association ("PMA") files this Motion to Intervene in the above-captioned cases.

I. INTRODUCTION

PMA seeks leave to intervene in this matter to ask the Board to vacate its decision in *Int'l Brotherhood of Electrical Workers, Local 48*, 358 NLRB 903 (2012). PMA sought intervention before this decision issued, however the Board denied PMA intervenor status. The Board also disregarded PMA's legal position that the Board lacked jurisdiction to intervene in a work assignment dispute between *private*-sector and *public*-sector employees at the Port of Portland. The Board proceeded to award the disputed work to the Port's employees. This error has had a

lasting, harmful impact from PMA's perspective, including unnecessary litigation before the Board and the federal courts.

PMA now renews its efforts to intervene in this case, following the Board's April 13, 2017 invitation for the parties to file "statements of position" as to how the Board should proceed in the pending Section 8(b)(4)(D) cases. PMA respectfully seeks to intervene in order to file a statement of position to ensure the current Board receives PMA's legal argument and then squarely addresses it.

II. RELEVANT FACTUAL BACKGROUND

PMA is a California non-profit mutual benefit corporation. It is headquartered in San Francisco and has branch offices in several United States West Coast cities. Its members include approximately 50 for-profit stevedore companies, marine terminal operators, and cargo-handling equipment maintenance and repair contractors that employ longshore workers and other categories of dockworkers to load and unload cargo from seagoing vessels at waterfront facilities located at ports in California, Oregon, and Washington. PMA is a multi-employer collective-bargaining agent: its primary purpose is to negotiate, enter into, and administer on behalf of its members collective-bargaining agreements with the ILWU International and certain of its Longshore Division Locals, which represent the West Coast dockworkers.

The functions PMA performs, its relationship with the ILWU, and the unique characteristics of dockworker employment at ports on the U.S. West Coast are rooted in a 1934 interest arbitration award by a short-lived New Deal federal agency called the "National Longshore Board" and a 1938 certification decision by the NLRB while in its infancy. *See Shipowners' Ass'n of the Pac. Coast,* 7 NLRB 1002 (1938) (establishing a coastwide multiemployer bargaining unit of workers engaged in longshore work), *review dismissed sub nom. Am. Fed. of Labor v. NLRB*, 103 F.2d 933 (D.C. Cir. 1939), *aff'd,* 308 U.S. 401 (1940);

California Cartage Co. v. NLRB, 822 F.2d 1203, 1206 (D.C. Cir. 1987) (discussing the parties' long bargaining history). PMA is the successor to the employer associations named in the Board's original and historic certification.

The largest categories of West Coast dockworkers are longshore workers and marine clerks. Longshore mechanics are a sub-category of longshore workers. The main terms and conditions of employment for longshore workers, including longshore mechanics, and marine clerks employed by PMA member companies at West Coast ports appear in the Pacific Coast Longshore & Clerks Agreement ("PCL&CA"). The PCL&CA is a master agreement between PMA and the ILWU International covering a coastwide, multi-employer longshore worker and marine clerk bargaining unit. The PCL&CA is set forth in two documents: the Pacific Coast Longshore Contract Document ("PCLCD") covering the longshore workers; and, the Pacific Coast Clerks' Contract Document ("PCCCD") covering the marine clerks. Currently, there are approximately 19,000 longshore workers and approximately 1,500 marine clerks in the bargaining unit. The current PCL&CA is effective from July 1, 2014 to July 1, 2019.

When a dispute erupted in 2012 between the private-sector ILWU-represented dockworkers, including longshore mechanics, employed by ICTSI, and the public-sector IBEW-represented electricians employed by the Port of Portland over refrigerated container plugging, unplugging, and monitoring work on ICTSI's Port of Portland terminal, Section 10(k) procedures were invoked in Case No. 19-CD-080738. PMA timely attempted to intervene in those proceedings, including before the Regional Director, and at the Board. PMA's requests to intervene were denied, on the theory that other parties could adequately represent PMA's interests and/or arguments. PMA's central legal argument – that the Board lacked jurisdiction to issue a Section 10(k) decision involving private-sector and public-sector employees claiming the

same work – went unaddressed despite PMA raising the legal argument two months before the Board's decision. The decision awarded the disputed work to the Port of Portland's employees, which created an irreconcilable conflict between the decision and the terms of the PCL&CA. Within one week of the Section 10(k) decision issuing on August 13, 2012, PMA filed a motion for reconsideration, which the Board rejected on August 29, 2012 because it allegedly "raise[d] nothing not previously considered."

PMA then sought judicial relief in the U.S. District Court for the District of Oregon. The Honorable Judge Michael W. Mosman found the Court had jurisdiction under *Leedom v. Kyne* to address the validity, or lack thereof, of the Section 10(k) decision. The District Court vacated the Board's decision as *ultra vires* on June 17, 2013. *Pac. Maritime Ass'n v. NLRB*, Case No. 3:12-cv-02179-MO, Dkt. No. 54 (June 17, 2013); *see also* Official Transcript of Proceedings Before the Honorable Michael W. Mosman, p. 47 (June 4, 2013). However, a panel of the Ninth Circuit reversed the District Court's decision on July 8, 2016. *Pac. Maritime Ass'n v. NLRB*, 827 F.3d 1203 (9th Cir. 2016). Most notably for present purposes, the Ninth Circuit observed that the Board likely exceeded its statutory authority in issuing the Section 10(k) decision, but the panel reversed the District Court because it found PMA had other avenues to challenge the Section 10(k) decision, *including through intervention in the pending Section 8(b)(4)(D) litigation before the Board*, or thereafter by a federal court of appeals under Section 10(f) of the Act. *Id.* at 1210-11 (emphasis added).

PMA now comes before the Board to seek the intervention suggested by the Ninth Circuit. To date, the Board has yet to address and reconcile the core defect in the Section 10(k) decision that the U.S. District Court for the District of Oregon and the Ninth Circuit both recognized.

III. ARGUMENT

PMA meets the legal standard for intervention in this Section 8(b)(4)(D) litigation, as addressed below.

A. PMA Is An "Interested Party"

In determining a motion to intervene, the Board considers Section 554(c) of the Administrative Procedure Act ("APA"), which provides that the "agency shall give all interested parties opportunity for … the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit …." *See Camay Drilling Co.*, 239 NLRB 997, 998 (1978).

There can be no question that PMA is an "interested party" given the litigation related to the Section 10(k) decision over the past five years. PMA took steps to intervene before the Board and then, when denied intervention, pursued litigation in the courts because PMA has a fundamental interest in how work is assigned under the PCLCD. This interest relates to PMA's relationship with the ILWU, as well as with its member companies. No party in the federal court litigation, nor the federal court judges involved, disputed the notion that PMA had a vested interest in the underlying Board proceedings.

That is because the Section 10(k) decision has impaired PMA's ability to enforce the PCLCD as applied to member company ICTSI. Specifically, on June 13, 2012, PMA and the ILWU filed suit against ICTSI in the U.S. District Court for the District of Oregon, under Section 301 of the Labor Management Relations Act, to enforce the May 23, 2012 decision of the CLRC that ICTSI must assign the disputed work to the ILWU. *Int'l Longshoremen & Warehouse Union & Pac. Maritime Ass'n. v. ICTSI Oregon, Inc.*, Case No. 3:12-cv-01058-SI (D. Or.) (filed June 13, 2012). Due to the Board's Section 10(k) decision, however, PMA has

been unable to enforce those CLRC decisions. Notwithstanding that Section 10(k) decisions are not "final orders" under the NLRA, courts have held that a Section 10(k) award "trumps the collective bargaining agreement" and "take[s] precedence" over other contractual obligations. *See, e.g., Int'l Longshoremen's & Warehousemen's Union v. NLRB*, 884 F.2d 1407, 1413 (D.C. Cir. 1989) ("Sea-Land"). Consequently, the Section 301 case has been stayed indefinitely due to the Section 10(k) decision in this case.

PMA thus has a clear and tangible interest supporting its motion to intervene: to request that the Board vacate its improperly issued Section 10(k) decision, which is interfering with PMA's efforts to ensure its member companies' compliance with the PCLCD, and which is essential in order to promote labor peace on the West Coast. PMA should be granted party status based on this valid interest. *See, e.g., Camay Drilling*, 239 NLRB at 998.

B. PMA's Interest In This Matter Cannot Be, And Has Not Been, Represented By The Other Parties

The Board's previous denials of PMA's attempts to intervene in the Section 10(k) case should be corrected now. The purported rationale for denying PMA intervention before – that other parties could adequately represent PMA's interests or legal positions – has been shown to be incorrect over the last five years. ICTSI has not represented PMA's interests because it has opposite views on which employees should perform the work at issue in this case. Nor does ICTSI believe the Board lacked jurisdiction to issue the Section 10(k) decision, despite the plain statutory language to the contrary. ICTSI has continued to oppose PMA's position and legal efforts in multiple forums, and ICTSI has pursued legal claims against PMA, which remain pending.

The ILWU cannot represent PMA's interests in this case because the parties are collective bargaining adversaries. On many occasions, the Board has granted PMA the right to

intervene in jurisdictional disputes involving the ILWU. *See, e.g.*, *ILWU Local 50 (Brady-Hamilton Stevedore Co.)*, 193 NLRB 266 (1971); *ILWU Local 26 (Newton Security Patrol, Inc.)*, 167 NLRB 817 (1967); *ILWU Local 13 (Princess Cruises Co.)*, 161 NLRB 451 (1966); *ILWU (Howard Terminal)*, 147 NLRB 359 (1964); *ILWU (Albin Stevedore Co.*), 144 NLRB 1443 (1963). Because PMA has interests that are unique from any other party in this case, the Board should now grant PMA's motion to intervene. *See Camay Drilling*, 239 NLRB at 998.

PMA's request should meet with no objection from the General Counsel. The General Counsel, throughout the *Leedom v. Kyne* litigation initiated by PMA in 2012, argued that if PMA moved to intervene in the pending Section 8(b)(4)(D) litigation, the General Counsel would not oppose such efforts. *Pac. Maritime Ass'n v. NLRB*, 827 F.3d 1203, 1210 (9th Cir. 2016) ("The Board could thus decide, in its discretion, that intervention is appropriate in the full unfair labor practice proceeding despite having denied intervention in the truncated Section 10(k) proceeding. Significantly, the Board has stated (and it informed the district court) that its General Counsel would not oppose an intervention by PMA in the unfair labor practice case.").

IV. CONCLUSION

For all the foregoing reasons, PMA respectfully requests that the Board grant this motion to intervene in the above-captioned cases.

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Respectfully submitted,

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